IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
LETTERS PATENT APPEAL NO.37 OF 2006
IN
WRIT PETITION NO.3429 OF 1995

1. Pune Municipal Corporation,
having its office at
Shivajinagar, Pune-411 005.

2. Shri Devavrat Mehta,
Municipal Commissioner,
Pune Municipal Corporation,
Shivajinagar, Pune-411 005.

3. The Manager,
Pune Municipal Corporation,
Printing Press, Dhole Road,
Pune. .... Appellants

- Versus -

Shri Dhananjay Prabhakar Gokhale,
Adult, Occ: Service at Pune
Municipal Corporation Printing
Press, Dhole Road, Pune-411 005. .... Respondent

Shri R.G. Ketkar for the Appellants.

Shri N.A. Kulkarni for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
Mrs. ROSHAN DALVI, JJ.

DATED: MARCH 29, 2006

ORAL JUDGMENT (Per R.M.S. Khandeparkar, J.):

1. Heard. The appellants challenge the order dated 29-11-2001 passed by the learned single Judge in Writ Petition No.3429 of 1995. By the impugned order the learned single Judge has dismissed the writ petition filed by the appellant against the order dated 28-9-1994

of the Industrial Court, Pune. By the said order, the Industrial Court had allowed the complaint filed by the respondent under Item No.6 of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, hereinafter called as "the said Act" and had directed the appellants to provide the benefits of permanency to the respondent with effect from 28-9-1987.

2. It was the grievance of the respondent, along with other employees of the appellants, that he was appointed as daily wage workman during the period from 1983 to 1986 as a Baller in the printing press of the appellant and that inspite of he having completed the period of continuous 240 days in service in the post, which was vacant and permanent post, he was continued as a temporary employee without granting the benefits of permanency and therefore the appellants were indulging in unfair labour practice in terms of Item No.6 of Schedule-IV of the said Act. In the course of the pendency of the proceedings, it appears that similar type of dispute with the other employees was settled and even in the case of the respondent, he has been granted permanency with effect from 10-1-1991. It is the case of the appellants that there was a settlement arrived at between the Corporation and the Union of the employees and in terms of the said settlement of September, 1989,

it was agreed that the employee who completes five years of continuous service would be entitled for permanency and accordingly permanency was granted to the respondent on his completion of five years of service. The Industrial Court, after hearing the parties, held that as per the provisions of the Model Standing Orders applicable to the parties, on completion of 240 days with continuity of service, it requires arrangement to be made to provide benefits of permanency to the daily rated workers and in the case of the respondent he having completed 240 days of continuous service for the appellants, refusal on the part of the appellants to give permanency to the respondent amounts to indulgence in unfair labour practice as contemplated under Item No.6 of Schedule-IV of the said Act. Being aggrieved by the said order, the appellants preferred the said Writ Petition No.3429 of 1995 which came to be dismissed by the learned single Judge, confirming the finding of the Industrial Court. Hence the present appeal.

3. Drawing attention to the decision of this Court in **Punjabrao Krishi Vidyapeeth, Akola v. General Secretary, Krishi Vidyapeeth Kamgar Union & others,** reported in 1994 (69) FLR 181 and the **State of Maharashtra and Anr. v. R.S. Bhonde and Ors.,** reported in (2005) 6 SCC 751, the learned Advocate appearing for the appellants submitted that the law on

the point that claim for permanency cannot be entertained in the absence of availability of permanent vacant post duly approved by the competent authority being well-settled, and in the case in hand it was neither the case of the respondent that any such permanent vacant post was available for granting of permanency to the respondent in the said post nor in fact such a vacant post was available at the relevant time, the Industrial Court as well as the learned single Judge erred in holding that the appellants had indulged in unfair labour practice under Item No.6 of Schedule-IV of the said Act. According to the learned Advocate, the said finding is not only contrary to the materials on record but the same has been arrived at ignoring the well-settled law on the point in issue. The learned Advocate appearing for the respondent, on the other hand, submitted that the plea about non-availability of permanent vacant post to accommodate the respondent therein was never raised before the Industrial Court and therefore the respondent cannot be non-suited on such a belated plea raised by the appellants and the only defence which was sought to be raised by the appellant was about the settlement of September, 1989 and that the permanency could have been claimed on completion of five years of continuous service and not on completion of 240 days of service. However, the Industrial Court referring to the provisions of the Model Standing Orders

applicable to the parties rightly held that on completion of continuous service of 240 days, the respondent was entitled for the benefit of permanency and therefore no fault can be found with the impugned order passed by the learned single Judge.

4. It is not in dispute that the complaint which was filed by the respondent was merely on the basis that the respondent had rendered continuous service of 240 days for the appellants and therefore he was entitled to claim permanency and that the same was denied to the respondent and that, therefore, the appellants have indulged in unfair labour practice under Item No.6 of Schedule-IV of the said Act. Undisputedly, it was not the case of the respondent that there was a permanent vacant post available with the appellants and yet inspite of completion of continuous service of 240 days he was not absorbed in the said post. The contention that the defence in that regard was not raised by the appellants and that therefore they were not entitled to raise the said point before the learned single Judge in writ petition, nor they could raise the said issue in this appeal, is devoid of substance. It is well-settled that the person who approaches the Court with the complaint of failure on the part of the employer to provide necessary benefits which the complainant claims to be entitled to, it is necessary for the complainant

to plead the factual matrix which could justify the claim of the complainant. In the absence of relevant facts being pleaded, the onus would not shift upon the opponent/employer to raise the plea of absence of facts necessary to justify the claim. Undoubtedly, irrespective of the fact whether the complainant has pleaded a particular fact or not, nothing prevents the opponent from raising the plea beneficial to him in answer to the case put forth by the complainant. However, in case the complainant wants to take benefit of any factual situation, it is primarily for the complainant to plead and establish the necessary facts in that regard and in case of failure on the part of the opponent to meet the facts pleaded by the complainant, inference can be drawn about admission of those facts. However, in the absence of relevant facts being pleaded by the complainant, reluctance on the part of the opponent to raise the plea would not enure to the benefit of the complainant nor the Court can draw adverse inference against the opponents on that count. It was not for the employer to contend about the non-availability of permanent vacant post in the absence of a specific plea being raised by the complainant about the availability of such post. In case the respondent had specifically pleaded about the availability of such a post and if the same was not disputed or denied by the appellants, certainly inference could have been drawn in

favour of the respondent and in that case the appellants would have found it difficult to substantiate their plea of non-availability of permanent vacant post in the writ petition or in the appeal. But that is not the case in the matter in hand.

5. In **R.S. Bhonde's** case (supra), the Apex Court had clearly ruled that whenever a post falls vacant or is newly created with the approval of the competent authority, the same is to be filled-in by following the procedure prescribed for selection of a candidate amongst the daily wage workers, without ignoring the seniority aspect of such candidates. Indeed, it was held therein that:

> "as observed by this Court in **Mahatma Phule Agricultural University and Ors. v. Nasik Zilla Sheth Kamgar Union and Ors.**, 2001 (7) SCC 346 the status of permanency cannot be granted when there is no post. Again in **Ahmadnagar Zilla Shetmajoor Union v. Dinkar Rao Kalyanrao Jagdale**, (2001 (7) SCC 356), it was held that mere continuance every year of seasonal work obviously during the period when the work was available does not constitute a permanent status

unless there exist posts and regularization is done."

6. Similarly, in **Dhampur Sugar Mills Ltd. v. Bhola Singh,** reported in 2005 AIR SCW 1572, it has been ruled by the Apex Court that, it is now well-known that completion of 240 days of continuous service in a year may not by itself be a ground for directing regularisation particularly in a case when the workman had not been appointed in accordance with the rules.

7. So also in **M.P. Housing Board & Anr. v. Manoj Shrivastava,** reported in 2006 AIR SCW 1235, it has been held by the Apex Court that, where the employee is appointed as daily wager but not against a vacant post which was duly sanctioned by the competent authority nor the appointment is made by following the statutory law operating in the field, then the employee cannot be made permanent employee and only because a person had been working for more than 240 days, he does not derive any legal right to be regularised in service.

8. It obviously shows that merely because an employee continued to render service for 240 days in a year, that by itself will not be sufficient for him to claim permanency in the post, unless he is able to establish that such a permanent post duly approved by the

competent authority is vacant and the claimant is duly eligible for being appointed in such post. Mere completion of 240 days of service by itself is not a carte blanche to an employee to claim permanency in the service of his employer. The law on this point is well-settled. No fault can be found with the contention sought to be raised on behalf of the appellants that the Industrial Court as well as the learned single Judge erred in ignoring this well-settled law while holding that the appellants had indulged in unfair labour practice under Item No.6 of Schedule-IV of the said Act in relation to the respondent.

9. It is then sought to be contended that the Model Standing Orders clearly provide under Clause 4(c) that the employees who have completed 240 days of uninterrupted service would be entitled for permanency in service. Undisputedly, inspite of this Clause 4(c) of the Model Standing Orders, the employees' Union of which the respondent was a member, had entered into a settlement being settlement of September, 1989 and in terms thereof it was agreed that the claim of permanency would be available to the employees only on completion of continuous service of five years. It is also not in dispute that all other employees who have completed five years continuous service have been granted permanency in accordance with the settlement of September, 1989 as and

when permanent vacant post duly approved by the competent authority had become available with the appellants. Besides, the Clause 4(c) of the Model Standing Orders cannot be read disjunctively and ignoring the well-settled law repeatedly reiterated by the Apex Court in various decisions. Once it is settled principle of law that mere completion of 240 days in service, in the absence of availability of permanent vacant post duly approved by the competent authority, would not be sufficient to claim permanency, and at the same time one cannot ignore the lawful settlement of September, 1989, arrived at between the parties. Besides, the Clause 32 of the same Standing Orders clearly provides:

> "Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment."

Once it is not in dispute that under the valid and lawful settlement of September, 1989, the employees had agreed with the appellants that their claim for permanency would be available only on completion of five

years of continuous service and depending upon the availability of permanent vacant post duly approved by the Government, no claim under Clause 4(c) of the Standing Orders ignoring the settlement arrived at can be entertained.

10. For the reasons stated above, therefore, the order of the Industrial Court as well as the order passed by the learned single Judge cannot be sustained and are liable to be set aside.

11. In the result, therefore, the appeal succeeds; the impugned orders are hereby quashed and set aside and the complaint filed by the respondent is dismissed. There shall be no order as to costs.

(Mrs. Roshan Dalvi, J.) (R.M.S.Khandeparkar, J.)

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